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Supreme Court of the United States

OCTOBER TERM, 1960

FRANCISCO ROMERO,

Petitioner,

—v.—

GARCIA & DIAZ, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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—v.—

GARCIA & DIAZ, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Francisco Romero, prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit decided January 9, 1961, reversing a judgment of the trial Court based on findings of fact and conclusions of law in favor of petitioner, and dismissing his complaint.

Prior Opinion by This Court and Opinions in Courts Below

Petitioner's cause against this respondent and others had previously been reviewed by this Court, 358 U. S. 354 (1959), following decisions at 142 F. Supp. 570 (S. D. N. Y., 1956) and 244 F. 2d 409 (2 Cir. 1957). The immediate opinion of the Court of Appeals, made a part of the appendix to this petition, is not yet officially reported. The immediate opinion of the District Court, by Palmieri, *D.J.*, filed April 14, 1960, found in the appendix of defendant-appellant below, is not officially reported.

Jurisdiction

Judgment was entered in the United States Court of Appeals for the Second Circuit on January 9, 1961.

Jurisdiction to review the judgment by writ of certiorari is found in 28 U. S. C. Section 1254 (1) and 2101 (c), as well as Rule 19 (b) of the rules of this Court under this Court's power of supervision over the Federal Judicial System, and more particularly that the Court of Appeals for the Second Circuit has rendered a decision in conflict with the decisions of this Court and of other Courts of Appeal and has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision. The prior decision of this learned Court in the instant case sets forth the jurisdictional basis of the District Court on remand.

Questions Presented

Petitioner respectfully prays that a Writ of Certiorari be granted and that this Honorable Court *summarily reverse* the Court below.

I

Where the Court of Appeals determined its "rule of free review" was expansive to the extent that it reviewed the evidentiary basis for the initial findings of facts and discarded them on conflicting probabilities, "Despite possible negative inferences that might have been drawn from *McAllister* v. *United States*, 348 U. S. 19 (1954)", and thereby misapplied the "clearly erroneous" rule as defined by this Court, should not this Court reassert what has been established in *McAllister* v. *United States* as the accepted and proper course of judicial proceedings?

A subsidiary question fairly comprised in the above is drawn from the immediate opinion below which concedes that its conception of the proper scope of review is in con-

flict with that expressed in the Ninth and Sixth Circuits, where the latter predicate their standard on principles established by this Court in *McAllister* v. *United States*.

II

Has the Court of Appeals so far departed from the intent and purpose of the remand by this Court, in deference to its initial opinion at 244 F. 2d 409, that by a trial *de novo* it has established an incorrect standard of conduct for an American maritime agent in charge of personnel and traffic aboard a foreign flag vessel in an American port?

The subsidiary questions fairly comprised in the above are as follows:

1. Is there not a substantial measure of control in respondent by the agency agreement whereby it is designated as the *exclusive consignee* of the vessel, and charged with a continuity of service for 12 years "*To organize* for the account of the Ship-Owner *all operation* of . . . loading and discharging merchandise and . . . making available . . . all equipment in personnel and materials required . . . "?

2. From the concurrence of findings by the Court of Appeals on the basic factual issues joined at trial, as well as the substantial and credible evidence accepted by the trial Court, is it not manifestly clear that respondent by its "coordinator" Suarez, pursuant to the powers and responsibilities conferred by the agency agreement, actually determined the traffic of personnel, their stations and functions, and by negligence in acts and failure to act substantially contributed to the circumstances and cause of the accident to Romero?

3. Has there not been an erroneous analysis of the case by the Court of Appeals which disregards the composite of circumstances establishing negligence from the entire picture instead of separated items?

4. Where the cause of the accident is drawn from a record clearly showing the commingling of crew and carpenter personnel, with differences in association, language and experience, and the insufficiency of men assigned to the task of spotting a boom that should have been performed by riggers kept from the scene by Suarez so as to save money for his principals, is respondent not clearly liable because of its substantial measure of control and reponsibility for these conditions of fault?

III

Though referring to this "now famous case", has the Court of Appeals disregarded the national and international importance of treating foreign seamen injured in our ports by American agents and personnel equally with seamen on American vessels, by finding instead that custom and practice in our ports vary with the vessel's flag?

IV

Should the record be reviewed not only because of the significance of this particular case, but also because of the traditional care exercised by this Court in all seamen cases, particularly where here the respondent had been judicially found to have been "overreaching" with respect to Romero?

Statement of the Case

It would be repetitious to discuss the background of this case prior to the remand and trial, which is recorded in this Court's prior opinion and the subject of leading law review articles.*

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* Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. Ch. L. Rev. 1 (1959); Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 Harvard L. Rev. 817 (1960).

At all times involved, the respondent Garcia & Diaz, Inc., under a 12 year contract with Compania Transatlantica, the owner of the SS Guadalupe, acted as exclusive consignee of its vessels and was authorized and required:

> "*To organize* for the account of the Ship Owner *all operation* of boarding and landing passengers, *loading and discharging of merchandise* and baggage and other tasks called for in port to assure regular service on the part of the Ship-Owner's vessels, *making available* to them for the account of the Ship-Owner, *all equipment in personnel and material* required for the purpose and governed by the availabilities at each port" (p. 193a of def. appellant's appendix below; italics supplied).

The vessel was manned by a Spanish speaking crew and Romero spoke only Spanish. Prior to arrival of the vessel in the Port of Hoboken, New Jersey at about 8:30 A. M. on May 12, 1954, respondent, by its responsible employee Suarez, arranged for Qain Lumber Co. to have carpenters aboard as soon as the vessel docked, and changed a prior shape-up of longshoremen-riggers employed by International Terminal Operating Co. to come aboard instead at 1:00 P. M. Suarez directed the carpenters to the work of fitting hatches for grain, and their stations, including hatches 1 and 2. The carpenters spoke only English and Italian. Suarez spoke both English and Spanish fluently, and acted as interpreter and coordinator of shoreside operations involving crew and shore personnel.

Concisely stated, while employed as a seaman on May 12, 1954 at about 10:00 A. M., in the process of handling a topping lift cable as part of an operation involving three other crew members, an insufficient complement to perform an unfamiliar task, to spot a boom over the dock to load four drafts of lumber for grain fittings in hatches 1 and 2, petitioner suffered grievous injuries when the boom fell and the unmanageable cable struck and encircled his legs. The operation was performed in the presence of shore

carpenters who were resentful of the delay since 8:30 A. M. that morning and goaded the seamen to quickly complete the spotting. Previously the topping lift cable had been disarrayed by the carpenters who threw or kicked it aside, so as to enlarge and create kinks additional to those already impressed in the wire. One of the carpenters attempted to assist petitioner by feeding him the cable while it was being surged upon a revolving gypsyhead by Romero. By reason of a kink placed in his hands, which could not be cleared in time, and also because of language and association differences that denied petitioner timely warning and experieneed assistance, Romero was compelled to let go to save his hands from entanglement. The free wire struck with the force of the falling boom to encircle and mutilate petitioner's lower extremities by traumatically amputating one and deranging the other.

By reason of the accident Romero suffered the injuries described in some detail in the 25th finding of fact. It is uncontested that "By reason of his incapacity he can be gainfully employed only in a sedentary occupation" (27th finding of fact). Six days after receiving his artificial leg on May 10, 1955, 20 days after removal of the cast from his other leg, he went to work for a year as a dishwasher, 60 to 70 hours a week for $50.00 a week, suffering extreme pain to the stump and his abdomen pressed against the sink to relieve the weight on his lower extremities (pp. 7a to 15a of appellee's appendix below; R. 1014, 1015, 1016, 1017).* He was compelled to this work by reason of having received no more from the respondent by its freight solicitor Menacho than $10.00 (pp. 5a, 6a, 11a of appellee's appendix below; R. 894 to 896, 1015) and the opinion by Walsh, *D.J.*, referred to *infra*, is to be read in *pari materia* on respondent's overreaching and abandonment of Romero. He later succumbed to tuberculosis and had a lung removed (R. 274-

* Numbers in parentheses with prefix "R" are page references to transcript of record, transmitted to this Court by the Clerk of the Court of Appeals.

277). At the time of trial petitioner was working as a seated power press operator earning $46.00 for a forty-hour week (R. 1018, 1019, 1027, 1455).

The actual disputes between the parties below on the evidentiary basis for the findings were affirmed by the appellate opinion in petitioner's favor. *Despite this, it may be stated as a fact that the Court of Appeals refuses to accept the issues that were joined at trial, and draws new defenses for respondent.* What was primarily in dispute concerned the scope and purpose of the remand as it related to a measure of control in the agent.

Respondent did not except to the presentation of proof to resolve this on the evidentiary basis of control over traffic and circumstances causally related to the accident. These major issues on the intent of the remand and related evidence, resolved in petitioner's favor by the Court of Appeals, are as follows:

1. That the remand from the Supreme Court did not preclude the trial Court from finding any facts to prompt liability on the basis of a measure of control in the agent over the traffic and circumstances involved in the accident.

2. That the timing of arrival of the longshoremen after the shoreside work began, and after the accident, was predetermined by respondent through Suarez, and not by any cable advices from the vessel.

3. That the earlier presence of the carpenters in the forward part of the vessel was arranged by Suarez, and known by him to be there when the boatswain in his presence was given permission by the chief mate to take three crew members, inadequate under the circumstances, to spot a boom over the dock to load carpenters' lumber.

4. That the operation to be performed by the crew members was not just to lower the boom, but also to spot it over the dock, an operation unfamiliar to the plaintiff and

violative of a custom of the port that it be done by longshoremen.

5. That Suarez was the "coordinator" between ship and shoreside personnel.

On these and other findings that were grounded in substantial evidence, referred to hereinafter, the Court of Appeals nonetheless concluded that "G & D did not have an affirmative duty to see to it that plaintiff was provided with a safe place and with safe methods to work. Admittedly, Suarez did not himself harm Romero, and no other employee of G & D was about" (p. 9a of appendix to petition).

The interfering presence of the shore carpenters and the absence of longshoremen who, by custom, practice and experience would have competently spotted the boom over the dock, were pre-determined by Suarez, respondent's coordinator and organizer of "all operation" of loading and discharging and making available all equipment and personnel required. As coordinator, variously known as "pier superintendent," "ship superintendent" and "port captain," and in the interest of respondent who was to realize a percentage on the profit related to quick and economical work accomplishment, he was mindful of the "economic factor" in delaying the boarding of longshore riggers. Further, Suarez, "evidently regarded as a not wholly trustworthy witness" (appellate opinion below, p. 8a of appendix to petition), was in a position to hear the boatswain's report to the chief mate that the carpenter foreman desired to have a forward boom spotted "and the judge was not bound to credit his denial even in the absence of contradiction" (p. 16a of appendix to petition). At this time the agent's overall supervision and control were such that the chief officer who affirmed the request was without any knowledge that shore carpenters were in the area of the boom to be spotted. Suarez knew but did not so advise the chief officer to provide additional seamen under the circumstances, or direct the shore carpenters to leave the area

during the operation. The circumstances of danger that were known or should have been known to Suarez, and unknown to the chief mate, prompted an insufficient number of crew members to spot a boom under the conditions expressed in finding 21 of the trial Court, i.e., the presence and participation of the unskilled marine carpenter who handed Romero a kinked portion of the cable; the disarray caused by the nature of the carpenters' work about the hatches and resulting kinked condition of the cable which was passed to him; the presence of several marine carpenters in and about the area of the accident, and the inadequacy of the work crew because of these conditions. There is also testimony by plaintiff that Suarez was actually present in the area of the work and directly ordered the boatswain on its performance without removal of the resentful and harassing shore personnel.

Since the remand petitioner has been granted the status of a permanent resident in this country by the Immigration Department, with intention to become an American citizen, has married and is employed in sedentary work.

After ten actual days of trial and demonstrative evidence aboard the vessel when visited by the Court and parties, as well as 1,462 pages of testimony, and 78 exhibits, some technical, which were the subjects of testimony by numerous witnesses, the trial Court made 32 findings of fact to favor petitioner. On the basis of parts of but two of these findings, and a misapprehension of plaintiff's contentions below, the Court of Appeals formulated its own findings *de novo*, reversed and dismissed the complaint.

Summary of Argument

By following its own standard of "free review" the Court of Appeals has again tried the case *de novo* by weighing the evidence and dealing at length with the evidentiary basis of the initial findings of facts. The trial Court's findings of facts, grounded in substantial and credible proof, have

been discarded and new findings based on defenses not made at trial are initiated against a seaman injured in an American port by American shoreside personnel. Despite the conscientious trial Judge's assessment of credibility, observation of the exact operation aboard the vessel involved, and substantial testimony by witnesses called by both sides, the Court of Appeals, without the opportunities of observation and initial impression to assess credibility, has erroneously reversed the judgment for petitioner and dismissed his complaint.

The errors in reversal and dismissal are apparent from the following:

1. The Court of Appeals concedes that its contrary findings of facts are made despite certain "negative inferences" established by this Court in *McAllister* v. *U. S.*, *supra*, and candidly disagrees with decisions in the Ninth and Sixth Circuits that accord with the McAllister principles.

2. Actually the Court of Appeals went beyond its own different standard of "free review" by making contrary findings on conflicting probabilities despite the evidentiary basis supporting the fair and reasonable findings in favor of petitioner.

3. The Court of Appeals misconceives the standard of conduct to be applied to a maritime agent. It overlooked the provisions and intent of the agency agreement whereby respondent is designated for the shipowner's account as its exclusive organizer of shoreside functions and as consignee of its vessels, pursuant to which it had a substantial measure of control over the traffic, people and circumstances involved in the accident. The contractual authority and undertaking of respondent was "To organize . . . " the particular operations involved at the time and place of accident. In its present context the word "organize" has but one meaning and must not be diluted because the obligation flowing from it is also owed to an alien seaman.

4. Apart from the agency agreement, respondent is absolved of fault because its responsible employee Suarez was, by his own concededly unreliable testimony, not constantly aboard the vessel while in port and could not foresee the exact causal chain prompting petitioner's injuries. That he was present when the accident occurred, and was responsible for causally related omissions and commissions within the ambit of his obligations, are clearly established by credible and substantial evidence to support the initial findings of facts.

5. This is a case of national importance, significant not only because of its past decisional history, but because it will symbolize the consistently humane concern by our Supreme Court for seamen as wards of the admiralty when they suffer injuries in our ports, particularly here by the fault of an "overreaching" agent. To deny him redress because he is a foreign seaman, not injured on an American vessel, is to stigmatize the principle of equal justice for all within our Federal Judicial System. Such cases as the Court of Appeals cites for its expanded scope of "free review" do not support the *temper* of the approach and the *mischief* that has resulted from the reversal and dismissal below.

There is a most interesting parallel between Romero and McAllister. Both became crippled by reason of shoreside personnel negligently permitted aboard their vessels and in their areas of work; both had been to the Supreme Court for resulting decisions of great national import; both suffered reversal of the trial Court's findings of fact by the same Court of Appeals; and Romero in great measure is dependent on the principles enunciated by this humane Court in favor of McAllister. Respectfully, there are no "negative inferences" to be drawn from *McAllister v. U.S.*, and the expansive scope of review assumed by the Court of Appeals is not only in conflict with the Ninth and Sixth Circuits, as the opinion below concedes, but

also with the meaning of "clearly erroneous" as every other Court of Appeals has determined. Manifest injustice would result if this be treated as "an issue which we may leave for another day," in context with the mischief resulting to Romero from the application of an improper standard of conduct by a husbanding agent with general powers aboard a vessel, in charge of the traffic and responsible for omission and commission of circumstances causally related to his permanent and total injuries.

Reasons Relied Upon for Allowance of the Writ and for Summary Reversal

FIRST POINT: By what the Court of Appeals had misconceived and overlooked in its "free review" of the evidentiary basis for the initial findings of facts in favor of petitioner, it is apparent from the record that the reversal was itself "clearly erroneous".

Because petitioner also prays for a summary reversal, and to save the Court the valuable time expended in reading further briefs where the error can be clearly visualized by this petition alone, we respectfully ask the Court's indulgence in allowing a discussion in depth by a full presentation of the factual items in conflict and discussion on the applicable law in subsequent points. By the very nature of the Questions Presented, related as they are to the permissible scope of appellate review of the evidentiary basis for the initial findings, a direct and concise argument on the facts material to the purpose of this petition must necessarily consider the actual functions of the agent through its responsible employee Suarez; the elements of a substantial measure of control in the agent, delegated by the agency agreement between respondent and the shipowner; practice and custom related to the use of longshoremen,

or carpenters in their absence, in spotting a boom while the vessel is involved in port operations; and discussion on the presence of the carpenters as a hazard to the operation by the crew. These should be read in juxtaposition to the new findings and reasons for discarding the evidentiary basis favoring petitioner, as they appear in the immediate opinion below. By specific references to testimony and exhibits it must be apparent that the original findings of fact were grounded in substantial evidence of greater weight.

1. On the actual functions of the agent through its responsible employee Suarez.

The Court of Appeals ignores the decisional authorities on the liability of an agent in charge of the traffic aboard a vessel that is causally related to the circumstances of an accident. The agent's supervisor need not himself directly harm another, or in fact be present at all times, to be liable for the forces he had set in motion. Further, though it is conceded that the credibility of Suarez is less than wholesome, the opinion below finds support for him, without reference to the record, in the testimony of Selvaggio, Romero, Martinez, the chief mate, and the boatswain. No mention is made of the pertinent testimony of Edward J. Quin, President of the carpenter company, Joseph Jerkovich, head foreman for the stevedoring company, other crew members and shore personnel, who together with those referred to in the opinion, gave significant weight to the original findings as to the broad scope of performance, responsibility and culpability of Suarez. It is to be noted that all these witnesses, with the exception of Romero, testified for respondent with varying interests in its defense.

The opinion also misunderstands petitioner's recorded contentions during trial. It was contended that the predetermined absence of the longshoremen, who should have spotted the boom, was an item of fault, compounded by the

agent's failure to allow and direct the carpenters to do this particular job for the loading of its lumber, in the absence of the longshoremen, or at the very least, keep them from interfering (pp. 1a to 4a of appellee's appendix below; R. 762, 763, 780, 1702 to 1706). Plaintiff continually asserted that stevedore riggers were required under the circumstances, that in their absence the carpenters with their nucleus of riggers should have done the work, but were precluded by the inaction of Suarez. This was the gist of the testimony by plaintiff's experts as well as some of the experts who appeared for the agent, particularly one McAllister who stated that it was the custom in the Port of Hoboken to use a "sailor" gang of longshoremen, consisting of a minimum of 7 men (R. 2028), and that *only the economic factor* would keep them from doing that work to precede the boarding of regular gangs of longshoremen at 1 P. M. (R. 2029).

Selvaggio, the carpenter foreman, pertinently described Louis Suarez's function as "He is always around there . . . He is the superintendent, as far as I know" (R. 1396). Though he took the liberty of speaking to the mate or boatswain, as referred to in the appellate opinion below, yet, "Unless I ran into difficulty, then I would go to see Louis, to go to see the mate. He represents the steamship company" (R. 1411). His understanding of Suarez's function was such that he was considered to be "the port captain . . . He is the one that tells us what to do, yes sir" (R. 1411), and "I said if I ran into trouble I would go to Louis and make Louis take care of it" (R. 1412). His problems would be stated to Suarez as to materials and extra men needed (R. 1417), and during prior trips of the vessel he had worked out with Suarez what he "had to do and what you could do on the ship" (R. 1418). He had instructions from his employer Quin to talk to Suarez if there were any problems on the vessel, as Suarez represented the agent and "he was the man I was doing business with" (R. 1426,

1427). As regards any particular carpentry function, "Well, he give me how many hatches, and I give him an idea of how many men, he okays it, and I bring in the men" (R. 1397). The bill for carpentry was directed to and paid by the agent (R. 1398).

The appellate opinion below does not discuss or show where Selvaggio's testimony "as a whole" contradicts the unequivocal excerpts recited above, nor can any substantial contradiction be found in the record. Regardless, the testimony by this interested witness for the agent that directly hired his firm, was subjected by the trial Judge to the same assessment on credibility as Suarez, with a better opportunity than the Court of Appeals to ascertain what was believable and to reject the balance.

That Suarez did not have power of superintendence as "pier superintendent" over Pier I is, of course, immaterial to his functions and responsibility on the vessel itself. The title of "pier superintendent" is self-designated in a sworn affidavit to the Court (R. 1858 to 1862), and was so known to Martinez, respondent's treasurer, who testified that Suarez was not the cargo representative, but "pier superintendent" (R. 892, 893). His superintendence over the vessel is clearly expressed in the report of accident by the stevedore's pier manager, wherein is found the following:

> "The S.S. Guadalupe docked at 8 A. M. and we were instructed to hire two gangs to start loading stores in #3 hatch, and general cargo in #4 hatch at 1 P. M., *by Mr. Louis Suarez as the ship's superintendent.* Ship had to be fitted for grain in #1, 2, 3, 5 and 6 hatches . . . *We were instructed by Mr. Suarez, ship's superintendent of Garcia & Diaz, which hatches we were to work*" (Pl's Exh. 29, R. 1788). (Italics supplied.)

From this above it is clear that the operation involved was more than to simply lower a single boom, as referred to in the appellate opinion below.

At the very least it was Suarez' duty to advise the chief mate of the circumstances of danger that he alone knew, particularly of the interfering presence of carpenters in the forward area of the vessel where an inadequate complement of crew members had been sent to spot a boom.

Martinez, an officer of respondent, referred to the obligation of Suarez to see that "operations are moving smoothly, and to act as representative between the captain and the stevedoring company" (R. 892, 893, 894). Joseph Jerkovich, then head foreman for the stevedore at Pier 1 in Hoboken, testified that his longshoremen were not to come aboard until 1 P. M. pursuant to directions from Suarez (R. 1701, 1706, 1708). This boarding had been deferred by Suarez from an earlier shape-up (R. 1790).

Edward J. Quin, President of the Quin Lumber Co. and employer of the carpenters, including Selvaggio, is not referred to in the opinion below. He testified he knew Suarez,—"I know that he is the pier superintendent for Garcia & Diaz" (R. 1639), and had a regular course of dealing with him. Suarez "would order a foreman and so many men, which he thought would be sufficient to run the job," and advised him which hatches had to be worked, including Nos. 1 and 2 on the day of the accident (R. 1640). Quin confirmed it was Suarez who decided when the carpenters were to board the vessel and this also applied to other shore personnel (R. 1666). He significantly noted that his men were waiting around since 8:30 A. M. for lumber to be brought aboard, and it was the function of Suarez to see that the work was being accomplished (R. 1672, 1673). As longshoremen came aboard after 1:00 P. M. to work with the carpenters, he knew "no reason at all why they weren't there from the beginning" (R. 1674). At the time there were 20 carpenters on the job (R. 1628, 1629). The carpenters were paid by the agent from 8 A. M. on the day of the accident (R. 1655). Of the 20 men on the list, about 6 were permanent carpenters, the remainder from the hiring hall (R. 1667, 1668, 1669), and several had experience as longshoremen (R. 1669, 1670).

The duration of Suarez's association with the vessel and its personnel is found in the testimony of the boatswain who had known Suarez since 1946 (R. 1316, 1316a), seaman Pena who had known him since 1941 (R. 1351), another seaman Caamano who had known him for his entire service of seven years on the vessel (R. 1362, 1363), and he was known to the chief mate since the latter started at sea nineteen years before (R. 1432).

Romero knew of Suarez as the "man in charge of the pier" (R. 957), and observed he gave orders to the crew and shore personnel (R. 958, 959, 1057, 1058, 1122), and promptly after the boatswain talked to Suarez the plaintiff received orders to work on the booms (R. 961, 1123). The trial Court's synopsis of this portion of plaintiff's testimony, based on what others did after Suarez spoke to them, was " . . . and that's why he thought he was giving them orders. He saw people doing things as a result of his talking to them . . . " (R. 1058). Further, Romero observed Suarez at hatch No. 2 during the spotting operation just prior to the accident (R. 982, 989). Even though not taken by the trial Judge, this testimony would support the judgment. *Langnes v. Green*, 282 U.S. 531, 535-39.

Boatswain Sampedro testified he had been asked by Selvaggio to lower a boom while he and other crew members were working in the after part of the vessel, that he could not speak English, and that the request by Selvaggio was made in a mixture of Italian and Spanish, while both the chief mate and Suarez were "right next to hatch No. 5" (R. 1323, 1324, 1325); that he left with two men, Romero and Pena, and was joined by the storekeeper Caamano (R. 1313, 1314), leaving the balance of the crew at hatch No. 5 dismembering the swimming pool (R. 1309, 1310, 1312, 1313). Sampedro described his function as "my job was simply to lower and raise; that's all" (R. 1337).

In a statement given by Caamano on June 18, 1954 (R. 1358, Pl's Exh. 46), he unequivocally stated that this work

should have been done either by the stevedores or the carpenters. In this context is noted again the concurrence in the appellate opinion below with the trial Court's finding that Suarez heard and knew of the carpenter foreman's request for crew members to handle the boom to raise lumber from the dock. No other witness than Suarez, however, testified as to the few hours he spent on the vessel, missing some days, and again in context is noted the concurrence in the appellate opinion below that the trial Court was justified in discounting Suarez "as a not wholly trustworthy witness," vitiating his testimony that was accepted on the ground earlier stated "This, according to Suarez, was the limit of what he did or was expected to do" (p. 7a of appendix to petition).

In hypothetical questions posed to experts, as well as in argument, petitioner's counsel did not rely on the self designation by Suarez, though supported by Martinez, as "pier superintendent," but referred to his actual functions on behalf of respondent (R. 1266, 1267).

Based on a hypothetical question as to which the Court observed " . . . those statements are all supported by evidence in the record" (R. 1156), Captain William C. Ash, a master mariner, marine instructor and formerly executive officer at maritime training academies at Fort Schuyler, Kings Point and Fort Trumball (R. 839 to 846), unequivocally testified that Suarez was "the primary cause of the accident . . . sparkplugging the whole operation" (R. 1159, 1161).

2. On the elements of a substantial measure of control in the agent through Suarez, as related to the agency agreement between respondent and the shipowner.

The representation by respondent was general and the actions aboard the vessel were such as to clearly demonstrate a substantial measure of concurrent control by this ship's agent. In fact, this representation went so far as

to prompt the District Court, on a motion to enjoin the shipowner and respondent from desperately pressing to have Romero prematurely discharged from the hospital for deportation without adequate redress, to the following sharp comment in an opinion by Lawrence E. Walsh, *D.J.*, October 22, 1954:

> "I find that persons acting for the defendants seriously overreached in their dealings with the plaintiff . . . " (R. 1921, 1922).

The scope of responsibility inhering in Suarez while the vessel remained in port was such that the chief mate was not informed and did not even know at the time he was approached by the boatswain, pursuant to Selvaggio's request, that there were any carpenters aboard (R. 1433, 1444, 1458, 1459, 1460). This is deemed so significant on the question of whether the chief mate's cargo functions over personnel in port were secondary to those exercised by Suarez, that his pertinent testimony on this is set forth in the appendix to the petition at pages 18a et seq.

The agreement between the agent and shipowner is tantamount to conferring *de facto* control on respondent as follows:

1. Respondent is designated as exclusive *consignee* of all vessels at any port of the Eastern seaboard, southern coast of the United States and Cuba, exclusively.

2. The duties of the agent were to organize and arrange for loading and unloading cargo, other tasks called for in port, and to make available all equipment in personnel and material required.

3. The agent shares in the net profit to the extent of 5% of net freight and passage brought aboard, is empowered to appoint sub-agents for any port at its own cost and responsibility, operate from a reserve fund set up by the shipowner, and could not transfer its rights and

obligations during the life of the agreement from September 17, 1948 to December 31, 1959.

4. That liability of each of the parties includes that imputable to " . . . fault or neglect of the subordinates of each party . . . " (Pl's Exh. 62 set forth in full starting at p. 190a of appendix for appellant below).

Suarez conceded that as *coordinator* he would make arrangements and suggestions related to operations and shore personnel (R. 1779, 1780), that he had been employed by respondent since 1926 and in 34 years worked in many capacities, known in outports as "port captain" and in Hoboken as "pier superintendent," but at the time he "was more of a coordinator between the terminal operators and the office" (R. 1756, 1757). The trial Court did not believe his self limitations in light of the record as a whole (see findings of fact 3, 22, 24, 25). Even his superior Martinez defined his function as that of seeing that "operations are moving smoothly and to act as representative between the captain and the stevedoring company" (R. 892, 893, 894). His long association with the vessel and its owner bespeaks a familiarity of its functions in port and the dangers that engulfed Romero. His fault of omission and commission is highlighted by this extensive background.

3. On practice and custom related to the use of longshoremen, or carpenters in their absence, in spotting a boom while the vessel is engaged in operations in port.

There is no evidence that the owner in any way concurred with Saurez as to when the longshoremen should board the vessel. In fact, respondent's attempt to prove this by reference to a cable from the vessel is also discounted in the immediate opinion below, footnote 1, as follows:

"Defendant claimed the decision not to have the longshoremen report until 1 P. M. was made by the owner and communicated to G & D by a cable. In view of the

testimony and of defendant's failure to produce any such cable, the trial judge was justified in finding that the decision not to have the longshoremen available in the morning was made by G & D" (p. 4a of appendix to petition).

There is no quarrel with so much of the 16th finding of fact which found Suarez delayed the boarding of longshoremen until 1:00 P. M. because of a contingent financial interest in the saving of such costs.

There is no contention or a scintilla of proof in the record that the custom and practice of having longshoremen perform rigging operations, particularly where resident contractors in the Port of Hoboken would be aboard, differed with the flag of the vessel. To reverse a trial Judge who assessed credibility and actually went aboard the vessel involved to observe the operation, with a conflicting finding that the practice on American ships differed because of union demands for job security rather than on safety considerations, is as fair as the inference made that a falling boom would discriminate between crew members and carpenters.

Caamano's statement was that this work should have been done either by the stevedores or the carpenters, which is not only corroborated by Romero, equally deserving of belief, but by the experts called by petitioner, and some of the experts called by respondent. On this assessment of the credibility of witnesses whom the Court of Appeals never saw, opposing testimony is accepted instead to discard the evidentiary basis for the original findings.

Captain William C. Ash, plaintiff's expert witness, stated it was the custom and practice in the Port of Hoboken that the crew would not spot booms for shore personnel aboard for specific reasons, including safety of the crew personnel, particularly where there is pressure on crew members caused by shore workers waiting around (R. 1135, 1136, 1137). The Court of Appeals misunderstands this

testimony by stating "Ash's evidence was that this practice was designed primarily for the safety of the carpenters . . ." (p. 13a of appendix).

It was also his testimony that raising or lowering booms is an all-hands job, and "If there is any impression of haste, it is a worrisome thing to the men, and those are the things that can cause the accidents" (R. 1138). He testified it was dangerous to intermingle crew members with shore workers in the same operation because of difference in understanding, association and language (R. 1141, 1142).

Ash also stated carpenters handle booms and winches to raise their own gear when stevedore riggers are absent (R. 1143, 1144, 1169), as in every carpenter gang there is a nucleus of riggers (R. 1168, 1878), who should have performed the loading of the lumber, particularly where at least four drafts were involved (R. 1804, 1805, 1873, 1876).

The work to be performed was not only to "lower a single boom", but to work with all booms at all hatches, some to load stores and others grain, and in fact after 1 P. M., when the longshoremen boarded, they worked with the carpenters who were still in the process of constructing grain fittings (R. 1788, Pl's Exh. 29). Joseph Jerkovich, head foreman for the stevedore, called as an expert witness for respondent, testified unequivocally that the custom of the port required longshoremen to handle cargo operations, including the loading of lumber (R. 1718, 1719). Amodio, the carpenter snapper of No. 2 hatch, admitted he had a nucleus of men with experience as longshoremen, and as a matter of regular practice 2 or 3 men are experienced riggers (R. 1537, 1538). Further, if longshoremen were aboard they would rig and operate booms to bring aboard carpenters' gear (R. 1603, 1604), it being rare to work without longshoremen present (R. 1604). Selvaggio conceded it was bad practice for the crew to spot booms while his men were about (R. 1399), that longshoremen,

if aboard, do the spotting (R. 1398), but Suarez "instructed us on what had to be done" (R. 1383).

It was Suarez who testified that an 8 A. M. shape-up of longshoremen set the day before, had been changed to 1 P. M., "and you don't pay for those men" (R. 1790), meaning that he saved his principal money by the delayed boarding. He did not call a "sailor" gang of longshoremen for rigging in the morning because of a purported union contract that would require the presence of the entire gang to be paid (R. 1799, 1800, 1809, 1810, 1907, 1908). Parenthetically, no such union limitation appears in the record. The carpenters, however, were expected by him to come aboard as soon as the vessel docked (R. 1830, 1831).

Though custom and practice are not binding, yet it is axiomatic they may be considered by the fact finder. Without any basis in the record the appellate opinion below dismisses custom and practice as predicated on "union demands for job security rather than on safety considerations".

In major respects Captain Ash is supported by the testimony of plaintiff's other expert, Anthony Orlando, a qualified carpenter foreman, who testified substantially as follows:

1. In the absence of stevedore personnel, the custom and practice would be for carpenter personnel to spot the booms and work the winches (R. 783, 785, 800, 807), and " . . . it is up to us to do the work, not to have anybody else around when we are doing it" (R. 787).

2. That it would be dangerous for a ship's crew to lower booms in port, and he had never before seen a crew member spot booms over docks (R. 808, 809, 815, 824, 826). Further, though carpenters handle booms "Only if there were no longshoremen around at the time" (R. 822), this can be done because there is always a nucleus of riggers in every carpenter gang (R. 827, 828).

The Court of Appeals accepts conflicting testimony of other witnesses, however, to differently conclude that the practice was to "have the boom lowered by the crew rather than by the carpenters", and without any basis in the record or experience, distinguishes between the presence of carpenters on deck rather than in the hatch to mean Orlando's testimony was also "oriented to the safety of the carpenters rather than of the crew" (p. 13a of appendix to petition).

Gordon D. McAllister, respondent's expert, conceded the following:

1. That a "sailor" gang of longshoremen is still used in the Port of Hoboken, consisting of a minimum of seven men (R. 2028, 2033), and

2. Only the economic factor would keep them from doing work before the boarding of regular gangs of longshoremen at 1 P. M. (R. 2029), and further, it is not the practice on American ships in New York for the ship's crew to spot booms before longshoremen come aboard (R. 2032, 2033).

One of the major issues on appeal below was concerned with whether Romero was hurt while simply lowering the boom, or while it was being laterally moved for spotting over the dock. The appellate opinion finds in petitioner's favor on this factual issue, as did the trial Court, but concludes without having observed the operation, unlike the trial Court, that this unfamiliar phase of the operation had no bearing, surmising the accident would have occurred were the operation limited to lowering. On this conflicting inference commentary is superfluous.

4. On the presence of the carpenters as a hazard to the operation by the crew.

The immediate opinion below admits "The only abnormal condition foreseeable to G & D when it was decided not to have longshoremen come aboard on the Guadalupe's arrival was that carpenters would be on board when a boom would be lowered to raise the lumber" (p. 11a of

appendix to petition), and further agrees that the disarray of the cable by the carpenters "may have made it desirable to supplement the normal complement with a seaman experienced in the work and capable of warning Romero in Spanish . . . (p. 15a of appendix to petition).

Suarez brought the carpenters aboard and determined their stations. He observed the boatswain leave with 2 or 3 crew members from the after part of the vessel to fulfill the carpenter's request made in his presence, and probably through him as interpreter, to spot a forward boom. The chief mate did not even know there were carpenters forward, when in fact there were 20 carpenters assigned to work the vessel, and as none were observed aft, then most would have been forward. Suarez also knew how many of the deck crew were taken for the assignment as the balance remained behind at No. 5 hatch. Not only did Suarez fail to make a suggestion to the chief mate to protect the inadequate number of crew personnel, he did not even advise him of the conditions forward, prompted by his hiring and timing of carpentry work at hatches Nos. 1 and 2. At no time did he have the carpenters leave the area, which was within his province and responsibility; nor did he request the carpenters to load their own stores. The record is replete with testimony by Quin, Selvaggio and others that though Suarez did not supervise the carpentry functions in detail, nonetheless he had a general supervisory power as to their stations and general work performance. There is no responsible witness who denied that the commingling of crew and shore personnel was hazardous. No witness testified that the hazard to a crew member was different than that to any other person in the area. The accident is proof to the contrary.

Amodio, the carpenter snapper for hatch No. 2, testified that several other carpenters were around when the accident occurred, and in fact at least one of his men was actually in the hold, with hatch covers and tarpaulins removed (R. 1529, 1530, 1531, 1582, 1585, 1591, 1592; Pl's

Exhs. 52, 54, 55). With respect to an oral statement he gave an attorney for petitioner, refusing to reduce it to writing as he had three other statements given to respondent, he admitted that on September 13, 1955 he had spoken to Mr. Narciso Puente, Jr., Esq., but didn't remember whether he told Mr. Puente that the seamen were slow in rigging just before the accident and had to be "pushed" (R. 1601, 1602, 1603). The rebuttal testimony by Mr. Puente was that he had been refused a written statement by Amodio, but made notes of the conversation almost immediately thereafter outside Amodio's home, wherefrom he refreshed his recollection that Amodio had told him the seamen were slow and had to be "pushed" (R. 2105 to 2110).

The pertinent testimony by Romero was that the topping lift wire he was to handle had been coiled by him earlier, and while the hatch covers were removed by shore personnel the cable became "all messed up" (R. 967, 968, 974, 1124). The lumber had been on the dock at the time of mooring, and was to be brought aboard for grain fittings; two of the shore workers were at hatch No. 1 and about 5 at hatch No. 2 at the time of the accident (R. 964). Behind Romero, by 2 or 3 feet, was a volunteer shore worker attempting to straighten the wire by clearing it of kinks, handing wire to him during the operation, and "I didn't talk to him and I'm sure he didn't understand me" (R. 974, 975, 976, 977, 1124, 1125). Though the cable had permanent kinks, the disarray caused them to become larger, and additional ones were impressed by the carpenters (pp. 27, 28 of Def's Exh. N, deposition of plaintiff taken on August 3, 1955).

It is apparent that in the violent suddenness and stress of the accident itself it would have been impossible for the plaintiff to have known which particular kink came to his hands, whether it was a permanent bend made larger, or one caused by the disarray; but in either event a calm and unhurried operation by a sufficient, coordinated and

experienced rigging gang would most probably have prevented the accident under the same circumstances. The appellate opinion below concedes that the disarray of the cable and the kink may have made it desirable to supplement the normal complement, but would impose a strict burden of foreseeability as to knowledge in Suarez of the specific dangers involved. Respectfully, liability does not follow only from proof of exact knowledge of the dangers involved, though in the record there is testimony by Romero that Suarez was at the scene just before the occurrence (R. 989), corroborated by the Port of New York Authority police report that Suarez was a direct witness (Pl's Exh. 28; R. 1520, 1522, 1523, 1527, 1853), and Amodio's statement on October 5, 1954 (Pl's Exh. 52, R. 1595) that on the happening he observed "A lot of sailors and Louis Suarez, the ship's representative ran up to help the seaman who was injured". Romero also testified that the first to reach him after the accident was Suarez (R. 982, 992, 993).

There is no contradiction to Romero's testimony that just prior to the accident the shore workers were around, waiting for the lumber to be brought aboard,—"They appeared to be mad, excited, something like that, scornful, because we were doing the work they should do . . . " (R. 985, 990, 1107), and the operation was hurried because "We don't like to be among those people; they looked at us mad. We were in a hurry" (R. 1108).

The following portion of the immediate opinion below is self-contradicting and supports petitioner's contention on the interference of carpenter personnel who were prompted to the area by Suarez:

> "Also, although there is no evidence that 'the unskilled carpenter' affirmatively contributed to the accident, a fellow crewman experienced in handling the cable might have warned Romero and slowed the feeding of the cable to the gypsyhead" (p. 15a of appendix to petition).

If Suarez had at least directed the removal of the carpenters, an act within his responsibility and power to have them there initially, it is obvious that the English speaking carpenter who handed Romero the kink without its removal or timely warning, as well as the goading by the others, would not have been.

POINT II: The Court of Appeals relies on an incorrect standard of conduct for Suarez, representing a maritime agent with broad powers and responsibilities, and so erroneously reversed the trial Court's findings of greater weight and decisional support than its own conflicting findings and strained inferences.

The reversal of the trial Court lacks legal sufficiency, being based on inferences drawn from an erroneous theory of agency and strict foreseeability, lacking the immediate quality which the trial Court, influenced by observation of the operation involved, credibility of witnesses, experience and reason drew from clearly established facts. To re-weigh the evidentiary basis for the initial findings of facts is to assail without sufficient basis the juridical function of the trial Judge.

Though this Court's *McAllister* v. *U. S., supra*, is to be discussed on the issue of the scope of review in another point hereinafter, the facts therein, related to a standard of review, are in point. This Court reversed the result against McAllister for "In relation to the District Court's findings we stand in review in the same position as the Court of Appeals" (p. 20 of 348 U.S.), and held there was substantial evidence from which the District Court could find the shipowner negligent in permitting Chinese aboard from the polio-infected area of Shanghai, ". . . . to have the run of the ship and use of its facilities, and in furnishing the crude and exposed latrine provided on the deck of the ship, by reason whereof the petitioner contracted polio" (p. 22 of 348 U.S.). This Court recognized

there was a balance of probabilities and a reasonable inference for the District Court to make from the facts to prove "that petitioner was contaminated by the Chinese who came aboard the ship . . . Certainly we cannot say on review that a judgment based upon such evidence is clearly erroneous (citing cases)" (p. 23 of 348 U.S.).

This is compared with the facts in the instant case where Suarez determined the traffic and the interfering presence of the carpenters, without providing proper "equipment in personnel and material required" (p. 193a of def.-appellant's appendix below) in handling the boom for spotting over the dock, by reason whereof the petitioner suffered crippling injuries.

The appellate opinion below disregards applicable principles of agency, and inconsistently rejects *Quinn* v. *Southgate Nelson*, 121 F. 2d 190, as authority by referring solely to the agency agreement therein, whereas in the instant case it discounts the broad powers conferred on Suarez by disregarding the plain meaning of the shipowner's agreement with Garcia & Diaz. On a comparison of the functions of the agent in the *Quinn* case, *supra*, with those of Suarez, it is immediately apparent that Suarez exercised a broader, direct and more general power of control over the functions performed by all personnel while the vessel was in the port of Hoboken. Clearly we are not concerned with such control as might be exercised by officers and crew on the vessel at sea. The agent in the *Quinn* case received as compensation no more than operating costs plus overhead expenses, and it was held liable for the death of a bridge tender when the vessel was underway and crashed into a bridge. Liability was prompted by the opinion of Frank, *C.J.*, in part as follows:

> "*That a principal is liable for a wrong does not necessarily immunize his agent* (cases cited) . . . A plaintiff may be lucky enough to have a two-stringed bow . . . Common sense and the precedents make appellant liable on the facts of this case. It had a most substantial

measure of control over the operation of the vessel; it was paid to 'manage, operate and conduct the business of the line.' *The reserved powers of the owner could not possibly have been so burdensome as to deprive appellant of de facto control,* and there is no showing that in fact the owner did substitute itself as manager, either generally or at the time of this accident" (p. 191 of 121 F. 2d). (Italics supplied.)

lating the *Quinn* case to the instant facts, where Suarez ctually on the vessel, in port, performing functions d to cargo, shore personnel and traffic, unlike the t in *Quinn, supra,* where no representative of the agent aboard a vessel in transit and without any share in the profit to be realized in the enterprise, can it be denied Suarez exercised a substantially greater measure of rol over the circumstances of the accident to Romero did the agent in the compared case?

wo years after the *Quinn* case the Supreme Court af- ed its principle in *Brady* v. *Roosevelt Steamship Co.;* 317 U. S. 575, 63 S. Ct. 425, where on pages 429 and appears the following:

'For apart from any express contract the agent's rights of exoneration or indemnity has not been thought to extend to situations where his liability was based on his own fault. 4 Williston, Contracts (1936 Ed.), Sec. 1026 . . . The question is not whether the Commission had authority to delegate to respondent responsibilities for managing and operating the vessel as its agent. *It is whether respondent can escape liability for a negligent exercise of that delegated power . . .*"

onsideration of the type of agency powers exercised spondent, contrasted with a special or limited agent, nd in *Todd Shipyards Corp.* v. *The City of Athens,* Supp. 67, 88, where Chestnut, *D.J.*, wrote as follows:

t is clear enough that the general agent in the Centau- us had a much broader scope of authority in relation-

ship to the owner . . . ", and cited A.L.I., Restatement of Agency, s. 3, as follows:

> "A general agent is an agent authorized to conduct a series of transactions involving a *continuity of service*. A special agent is an agent authorized to conduct a single transaction or a series of transactions not involving a continuity of service."

Certainly respondent as *exclusive consignee* and *organizer* of shoreside operations for 12 years performed a continuity of service.

The appellate opinion below strangely concludes against petitioner on the ground that though it accepts the axiom that an agent is liable for its own negligence, it could not apply here as the agent did not have an affirmative duty to see to it that plaintiff was provided with a safe place and with safe methods to work and that Suarez himself did not harm Romero. Its reference to the *Restatement of Agency 2nd, Section 351*, that an agent is liable in tort if he "directs or permits conduct of another under such circumstances that he should realize that there is an unreasonable risk of physical harm to others or to their belongings" is a correct standard which was not given meaning by a reasonable application to the facts involved. A study of cases in point demonstrates that the standard of conduct by this agent's representative was such that he could and did direct and permit the conduct of the longshoremen and carpenters, and could have prevented the circumstances of the accident, and further, liability can be prompted by omission in failing to remove the interfering shore personnel and provide riggers, as well as commission in directing their presence in the area of harm and delaying the arrival of longshoremen.

Suarez sought to save the cost of bringing longshore riggers aboard the vessel during the morning hours for the obvious purpose of increasing the net profit for his employer and its principal. His gamble failed. He cannot

claim the right to immunity for this balance of care against cost, or of safety against production by prompting plaintiff and other crew members to bring lumber aboard for carpenters who were charging his principal for the delay in starting their work until the lumber was made available to them.

Cardozo, *C.J.*, in *Cullings* v. *Goetz*, 256 N.Y. 287, laid down the landmark principle that "Liability in tort is an incident to occupation or control." Though holding that there can be no covenant to repair a defective garage door without reservation of occupation or control in the landlord, he cited with approval from an English decision, *Cavalier* v. *Pope*, A.C. 428, 433, as follows:

> "The power of control necessary to raise the duty . . . implies something more than the right or liability to repair the premises. *It implies the power and the right to admit people to the premises and to exclude people from them.*" (Italics supplied.)

This is precisely why in the instant case the defendant was not favored by imputed immunity from the dismissal of the action against the shipowner and was remanded for a trial on its own negligence. The defense herein was related to whether Suarez was acting in the scope of his employ, and also whether there was foreseeability of this particular wrong from the acts or failure to act on the part of this agent's employee. *Wanca* v. *Penn Industries, Inc.*, 260 F. 2d 350, a *per curiam* opinion, held there was a breach of duty owed plaintiff for failure of action by an assistant foreman, with knowledge of the quarrelsome disposition of an employee, " . . . and his failure to act therefor constituted a breach of duty owed the plaintiff." (Pp. 350, 351. of 260 F. 2d.)

Where the employee is acting within the scope of his employ, surely his master must respond to a tort he then committed. Further, the nature of the instant agency is such that even if there be solely found nonfeasance within

the framework of control and responsibility that inhered in Suarez, liability is likewise to be invoked. But the act of bringing carpenters aboard, and the act of restraining stevedore riggers until the afternoon, as well as the other items of his performance pursuant to delegated powers to cause plaintiff's exposure and injuries, clearly spell out malfeasance. See Prosser, *The Law of Torts*, West Publishing Co., 2nd Ed., 1955, pp. 514-519, which states:

> "Where an agent or servant has accepted the control of property under a contract with his principal, and under circumstances where there is an obvious risk of harm to outsiders if he does not use reasonable care, the obligation of affirmative conduct has been imposed upon him. *The same is true where he has taken custody or control of people*" (cases cited, including Restatement of Agency, Secs. 351, 356). (Italics supplied.)

One of the major issues drawn relates to whether shore workers perform the function by custom and practice of handling ship's gear during cargo operations. Of course, historically this has been done by the crew, but if we look to controlling decisions it is apparent that there is recognized under modern divisions of labor a function of spotting booms for cargo operations taken on by shore workers in our ports, irrespective of the flag of the vessel.

> *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52;
> *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85.

In *Pacific Tow Boat Co.* v. *States Marine Corp.*, 276 F. 2d 745, the Court of Appeals for the Ninth Circuit referred to the *McAllister* case, *supra*, as dealing specifically with a "finding of fact" that the master of the ship was negligent and that thereby the scope of review exercised by appellate tribunal would be limited by Rule 52(a) of the Federal Rules of Civil Procedure, but with respect to a predetermined standard of conduct, "the fixing of that standard is

a jural act." In the instant case the erroneous standard set by the Court of Appeals is limited to where the agent directly injures a person, or is constantly aboard, not only when the accident itself occurs and is a consequence of his own act and failure to act.

Once it is determined that the standard set by the trial Court has rational basis in law, then reversal by the Court of Appeals was clearly erroneous. In the opinion below it was held that the trial Court's determination of negligence, as distinguished from the evidentiary facts leading to it, was a conclusion of law freely reviewable on appeal and not a finding of fact entitled to the benefit of the "clearly erroneous" rule. In support of its determination, "despite the possible negative inferences that might have been drawn from *McAllister* v. *United States* . . . " cases are cited on its continuing application of this rule in civil actions and in admiralty. These three cases, *Dale* v. *Rosenfeld*, 229 F. 2d 855; *New York, New Haven & Hartford Railroad Co.* v. *Gray*, 240 F. 2d 460, cert. denied 353 U. S. 966; and *Verbeeck* v. *Black Diamond Steamship Corp.*, 269 F. 2d 68, all after the 1954 McAllister decision, are clearly distinguishable on the temper of the approach and the mischief to be corrected.

In *Dale* v. *Rosenfeld*, *supra*, the action was concerned with the Securities Act and to rescind the purchase of stock through misleading statements in a prospectus. The complaint was dismissed below on the issue of due diligence, but reversed on the following:

> "But we do not agree that it was a finding of fact; it set a standard of conduct *pro hac vice*, and a standard so set was erroneous; hence we may reverse it" (p. 858 of 229 F. 2d).

In *New York, New Haven & New Hartford R. Co.* v. *Gray*, *supra*, concerned with action by an insured on two policies of marine insurance for loss when railroad cars with insured

goods rolled off a cartloat as a result of listing, the reversal was distinguished from a negligence case, as follows:

> "Accordingly, the judge's statement as to such conduct is not binding on us. And, as this is not a tort action, the horrendous niceties of the doctrine of so-called 'proximate cause', employed in negligence suits, apply in a limited manner only to insurance policies." (Opinion by Frank, C. J., p. 465 of 240 F. 2d.)

In *Verbeeck* v. *Black Diamond Steamship Corp., supra*, the action was concerned with fire loss, including deaths and cargo damage, with the issue related to the carrier's insurance in stowing inflammable crude naphthalene in used jute or burlap bags. The trial Court found the carrier negligent but that it was not the proximate cause and so granted exoneration from liability of the owner and for the charterer. Holding that in this case negligence was a conclusion of law to be reviewed, and as there was uncontroverted evidence that the naphthalene cargo was commonly used by the vessel's charterers, the Court held as follows:

> "We think there is ample evidence of proximate causation here and we are constrained to hold that the safety of life and property at sea requires a higher standard of care than the trial judge enforced" (p. 70 of 269 F. 2d).

Quite apart from what the Court of Appeals inferred from these prior decisions related to the scope of review, their underlying concern was not tempered by human claims of the individual, except in the *Verbeeck* case, where it was. As contrasted by Chief Judge Hughes in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251 (1940), the Court is concerned with a question of fact that must be defined "in the light of the mischief to be corrected."

The opinion below also relies on *U. S.* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395, decided in March 1948 before the *McAllister* decision, *supra*, to justify a conclusion that the

trial Court's findings were clearly erroneous and that it had a definite and firm conviction that a mistake had been committed. The *U. S. Gypsum Co.* case was concerned with the Sherman Act and a conspiracy to fix prices. After the trial Judge granted a motion to dismiss the complaint, an appeal directly to the Supreme Court prompted reversal and remand, primarily because the Government relied largely on documentary exhibits, and the testimony of witnesses were in conflict with contemporaneous documents, to prompt a conclusion that a mistake had been committed on giving these witnesses much weight, "particularly when the crucial issues involved mixed questions of law and fact" (p. 396 of 333 U. S.). The standard of conduct established by this Court was clearly different than one related to the maritime agent's functions and responsibilties in the instant case.

By reason of the obligations in a maritime agent concerning the traffic and circumstances involved in the instant accident, and the failure of the Court of Appeals to properly apply this standard, but instead created an entirely different one as to obligations and foreseeability, it is apparent that reversal is indicated. A study of the record, particularly those portions of the testimony accepted by the trial Court on the basis of observation and credibility, but tressed by visiting the vessel and personally observing the operation, as well as exhibits explained by witnesses, expert testimony and admissions by respondent's witnesses in interest, must leave a firm and definite conviction that the opinion below is erroneous.

A review of the decision below upon this ground is sought not only because the Court of Appeals chose certain evidence as opposed to other evidence, but because in reversing the findings of the trial Court it adopted a theory which is not based upon any evidence in the record, and, in fact, is in direct conflict with all of the evidence in the record and pertinent ruling decisional law on agency and foreseeability.

POINT III: The free scope of review expressed in the appellate opinion below, in effect expanded to a *trial de novo* on the weight of evidence to draw conflicting findings and inferences, is contrary to the limits established by this Court in *McAllister* v. *U. S.*, *supra*, as well as other decisions by this Court and other Courts of Appeals.

The Court of Appeals candidly admits to following a rule of "free review" to treat a trial Court's determination of negligence, "as distinguished from the evidentiary facts leading to it," as a conclusion of law. This scope is concededly applied in the instant case "Despite possible negative inferences that might have been drawn from *McAllister* v. *United States* . . . ," and limitations expressed by the Ninth and Sixth Circuits in *Pacific Tow Boat Company* v. *States Marine Corp.*, 276 F. 2d 745, 752 (1960) and *Imperial Oil, Ltd.* v. *Drlik*, 234 F. 2d 4, 10 (1956), cert. denied 352 U.S. 941. This conflict is regarded as "an issue which we may leave for another day," on its conclusion that the pre-McAllister principle expressed in *U. S.* v. *U. S. Gypsum Co.*, *supra*, prompts its reversal in that the findings of the trial Court were "clearly erroneous," and although there is evidence to support them, "the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

This latter conclusion is apparently resolved without a review of the entire record, for the opinion below does not refer to all the witnesses, or the germane testimony distilled in the trial Court's crucible of credibility and observation, separated from the residue of untruth and mischief to a seaman's rights. The discussion under Point I, *supra*, demonstrates that the Court of Appeals went into the evidentiary basis for the trial Court's findings of negligence, and treated this equally as conclusions of law. On this alone, as this learned Court stands in review in at

least the same position as the Court of Appeals, the manifestly erroneous reversal should itself be reversed.

It is apparent that this Court in *McAllister* v. *U. S.*, *supra*, defined the proper standard to an appellate review of a trial Court's findings to mean that findings should not be disturbed when supported by substantial evidence and reasonable inferences, despite a balance of probabilities. Rule 52(a) of the Federal Rules of Civil Procedure was held to limit the scope of review, wherein is pertinently expressed the following:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge of the credibility of the witnesses."

The late Chief Judge Hughes in *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U.S. 197, 229 (1938) wrote that "substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." He later wrote in *South Chicago Coal & Dock Co.* v. *Bassett*, *supra*, that whether a worker on a harbor supply boat was "a member of the crew," was a question of fact, not of law, as this must be defined "in the light of the mischief to be corrected" (p. 259 of 309 U. S., quoting from *Warner* v. *Goltra*, 293 U. S. 155, 158), and so affirmed a compensation award, as there was "evidence to support it."

In Accord: *O'Leary* v. *Brown-Pacific-Maxon Inc.*, 340 U.S. 504 (1951); *Rochester Telephone Corp.* v. *U. S.*, 307 U.S. 125 (1939).

The temper of the appellate approach below, in disregard of the mischief to seamen's rights involved, may be referred to the analysis by Learned Hand, Ch.J., in *Patterson Lightcrage & T. Corp.* v. *N. Y. Central R. Co.*, 126 F. 2d 992, 995, as follows:

> "As we have said, the decisions are myriad in which findings of the district court have been in fact treated

as final, but the locutions have varied by which the courts have described how far they thought themselves limited. We have gathered a number of these in the appendix annexed to this opinion; and an examination of them at once shows that they differ only in form from the phrase 'clearly erroneous' of Rule 52(a). All were designed to measure the reluctance of the appellate court to disturb what the trial court with its better opportunities had determined; and it is indeed at times possible to compare such reluctances when they imply a real difference in the temper of the approach; as for example that which protects a verdict, from that which protects the findings of a judge."

Though the jury was waived in the instant case to accommodate respondent and prevent undue delay in resolution by trial, nonetheless there is a substantially similar function in a Court sitting without a jury to appraise the credibility of the witnesses, to determine the weight to be given to their testimony, to draw reasonable inferences from the facts established, and to resolve conflicts in the evidence. Such is the province of a trial Court in a non-jury case. *Beard* v. *Achenbach Memorial Hospital Assoc.*, 170 F. 2d 859, 861. Once a substantial basis in the evidence is established, "the process of judicial review is at an end." *Gaytime Frock Co.* v. *Liberty Mut. Ins. Co.*, 148 F. 2d 694, 696. Other tests applied to a trial Court's findings are that they will not be disturbed "unless there is found to be a decided preponderance of the evidence against the same," *Wood Towing Corp.* v. *Paco Tankers*, 152 F. 2d 258, or "where a manifest abuse of discretion is disclosed," *Brast* v. *Winding Gulf Colliery Co.*, 94 F. 2d 179, or "unless it clearly appears to be contrary to the preponderance of evidence," *The Josephine & Mary*, 120 F. 2d 459, or "manifestly wrong," *The Potomac*, 105 F. 2d 94.

The limitations on the scope of review expressed in these cases go further in favor of petitioner than he needs. As a Court of Appeals cannot re-weigh the evidence, probe into

the evidentiary basis for the findings predicated on credibility and observation, or base counter findings on conflicting probabilities, in disregard of the testimony of witnesses who substantially support the original findings and explain exhibits of importance, then in effect the instant findings are deserving of the same inviolability as a jury's verdict.

Even in what was previously understood as a trial *de novo* in the admiralty, clearly inapplicable to civil cases as the one at bar, "it does not follow that in admiralty we put ourselves in the shoes of the trial Court and make our own independent findings of fact on the evidence in the record." *Boston Ins. Co.* v. *Dehydrating Process Co.*, 1 Cir., 1953, 204 F. 2d 441, 443. This latter opinion also defined "clearly erroneous," as it appears in Rule 52(a), to mean "clearly contrary to the preponderance of the evidence," and that a choice between two permissible views does not resolve for the appellate Court a new preponderance of evidence (pp. 444, 445, of 204 F. 2d). See: *Hougland* v. *Muscovalley*, 6 Cir., 184 F. 2d 530.

In Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. R. 239 (1955), at p. 242, is found a definition of a finding of fact as a "phenomenon independent of law making or law applying," and though difficult to eliminate from fact finding all elements of law making, nonetheless:

> "A finding of this sort will on judicial review normally be analyzed as a finding *simplicitir* and respected as such because it is in form a finding of fact, because the presence of the legal element is difficult to detect or isolate, and because the law making is so intellectually married to the fact finding. If, however, the court can detect that a presumption has become irrebuttable—though it would require a whole course of decision rather than a single case to detect it—then clearly the findings of fact involve a conclusion of law" (p. 246 of 69 Harv. L. R.).

There is no irrebuttable presumption in the instant case to disturb the original findings. What the appellate Court has done, in effect, was to discard the reasoning by the trial Court from substantial evidence to the conclusions of liability, by instead creating *de novo* another evidentiary base with lesser weight, from which it has reasoned to a conclusion beyond the context and equities of the case.

Jaffe, *Judicial Review: Question of Fact*, 69 Harv. L. R. 1020 (1956), refers to the maxim that a reviewing Court may not "weigh the evidence," and in the words of Mr. Justice Frankfurter, a Court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp.* v. *N. L. R. B.*, 340 U.S. 474 at p. 488.

Citing *U. S.* v. *Oregon State Medical Society*, 343 U.S. 326, 332, Fed. R. Civ. P. 52(a), and other cases in support, Professor Jaffe observed:

> "It is generally held that whether made by jury, judge or agency a determination of credibility is nonreviewable unless there is uncontrovertible documentary evidence or physical fact which contradicts it" (p. 1031 of 69 H. L. R.).

In the instant case the appellate Court inconsistently recognizes the trial Court's right to appraise, and consequent low appraisal of Suarez' credibility, and then goes on to conflicting findings largely based on the testimony by Suarez.

The two cases from the Sixth and Ninth Circuits, cited as *contra* to the view taken by the instant opinion, are both grounded in and refer to this Court's *McAllister* v. *U. S.*, *supra*. In *Imperial Oil Co.* v. *Drlik*, *supra*, the Sixth Circuit held that findings on contributory negligence were factual, not jural, and would not be disturbed as "clearly erroneous." This opinion by the Sixth Circuit cites its own *U. S.* v.

Standard Oil Co. of Kentucky, 217 F. 2d 539, also responsive to this Court's *McAllister* case, and held that even in the admiralty there is no longer a trial *de novo*, for "it appears that the scope of our review of the district court's factual findings is probably no broader than in other civil actions . . . " (p. 540 of 217 F. 2d).

Likewise did the Ninth Circuit in *Pacific Tow Boat Co. v. States Marine Corp., supra*, specifically repudiate any trend not to treat a finding of negligence as a finding of fact, though noting that in the Second Circuit a contrary view prevailed "and has not been modified in that circuit since McAllister was decided" (p. 752 of 276 F. 2d). Of course this is contrasted with the jural act of establishing a standard of conduct, discussed *supra*. The rationale of the Ninth Circuit in deference to the *McAllister* principle, is expressed in part as follows:

> "In the McAllister case the Supreme Court dealt specifically with a 'finding of fact' that the master of the ship was negligent. It was with respect to this finding that the Court there held that 'no greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure'" (p. 752 of 276 F. 2d).

This Court had previously expressed its concern for the trial Court's function, favored by the immediacy of observation and the singular opportunity it possessed to assess credibility. In *U. S. v. Yellow Cab Co.*, 338 U.S. 338 (1949), it was held that the reviewing court may not reject the findings of the trial Court which were based largely upon testimony of witnesses and involved imponderable factors and inferences from exhibits. In *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, this Court affirmed the value of findings based on credibility and added this was particularly true where the evidence was largely the testimony of experts accompanied by scientific dem-

onstrations. Applied to the instant case, there were multiple exhibits, some technical, as well as a visit to the vessel itself by the Court and parties to observe the very boom involved and its operation. These demonstrations in Court and aboard the vessel were as unavailable to the Court of Appeals as the oportunity to assess the credibility of witnesses, most of whom were beholden to the interests of respondent, but nonetheless buttressed petitioner's contentions on the violation by respondent of a standard of conduct required of a maritime agent under the circumstances of the agency agreement and performance by Suarez.

POINT IV: The reversal and dismissal of the complaint disregards this Court's traditional concern for the rights of seamen, American and foreign, who are injured in our ports, and unfairly grants an undeserved windfall to an overreaching agent whose fault was causally related to the circumstances of the accident involved herein.

The facts of overreaching and abandonment of petitioner by the shipowner and respondent in the instant case bespeak the need for and justification of this Court's humane concern for the rights of seamen. That Romero was a foreign seaman injured by a resident agent and shore personnel cannot be a basis for a different concern or standard against mischief to be corrected. Issues of jurisdiction and the internal economy of the vessel are not involved in the remand by this Court. Despite the comment in the opinion below that shoreside personnel follow different practices on American ships with respect to "union demands for job security rather than on safety considerations," and that with respect to foreign ships there is no evidence that shore riggers should spot the boom, the record is to the contrary and clearly shows the practice to be uniform and prompted by safety considerations for all. If the opinion below stands it will mean the

housands of foreign seamen who come to our ports will be deprived of equal justice when injured by American contractors aboard their vessels.

The reversal below is not supported by a single case involving seamen. This Court's traditional concern for seamen was sounded in *Garrett* v. *Moore-McCormack Lines, Inc.*, 317 U. S. 239, adopting the language of Mr. Justice Story that "They are emphatically the wards of the admiralty . . . " (p. 246 of 317 U. S.).

Professor Louis L. Jaffe had written that " . . . judicial review guarantees the deeply human claims of the individual against the pretensions of the merely expert" (p. 776 of 69 H. L. R.), and further:

> "If the judge is to judge as a man; if he is to apply his conscience to the whole record, then all the elements of the record that would move a man's conscience are relevant" (p. 1032 of 69 H. L. R.).

Though not mentioned at all in the appellate opinion below, the trial Judge's conscience was prompted by the elements of the record as a whole, including testimony by respondent's employees related to their post-injury overreaching of petitioner, in the context of their general and continuing representation of the shipowner.

The opinion below would abort the traditional and humane concern expressed in a clear and progressive mandate established by the 92 Supreme Court Justices since 1790, particularly so in this classic case of a crippled seaman callously cast on our shores by a resident agent.

CONCLUSION

The issues involved herein are of national and even international importance. They affect the everyday routine of all seamen, foreign and American, in every port in the country. The decision of the Court of Appeals is a departure from the rulings made by this Court, and if allowed to stand will have an injurious effect on the uniform application of the doctrines enunciated by this Court. For this "now famous case" to be finally decided by the Court of Appeals would create the impression among alien seamen and other nations that American tortfeasors, including an overreaching one, can avoid liability for fault on a foreign flag vessel, but not on an American vessel. It is of tremendous importance that it be demonstrated in "this now famous case" that American justice is equally applied and humane.

For the foregoing reasons petitioner respectfully prays that a writ of certiorari be granted and that this Honorable Court summarily reverse the Court below and reinstate the original Findings of Fact and all Conclusions of Law except that related to loss of future earnings, the subject of the cross-appeal not considered below, with the case remanded for a determination on this aspect of damages, or in the alternative, grant certiorari to review the entire record.

Respectfully submitted,

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ROBERT KLONSKY, Esq., *on Petition*

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 89 October Term, 1960.

(Argued December 6, 1960 Decided January 9, 1961.)

Docket No. 26254

FRANCISCO ROMERO,

Plaintiff-Appellee, Appellant,

—v.—

GARCIA & DIAZ, INC.,

Defendant-Appellant Appellee.

Before:

CLARK, WATERMAN and FRIENDLY,

Circuit Judges.

Defendant appeals from a judgment of the District Court for the Southern District of New York, Edmund L. Palmieri, *J.*, after a trial without a jury, awarding damages for personal injuries; plaintiff appeals from the failure to include damages for loss of future earnings. Judgment reversed on defendant's appeal and complaint dismissed.

NARCISO PUENTE, JR., SILAS B. AXTELL, and DICOSTANZO AND KLONSKY (Robert Klonsky, Edward D. Lory and Melvin W. Knyper, on the brief), Brooklyn, N. Y., *for Plaintiff-Appellee-Appellant.*

BIGHAM, ENGLAR, JONES & HOUSTON, New York, N. Y. (John L. Quinlan and John B. Shields of Counsel), *for Defendant-Appellant-Appellee.*

FRIENDLY, *Circuit Judge*:

This now famous case, 142 F. Supp. 570 (S. D. N. Y. 1956), 244 F. 2d 409 (2 Cir. 1957), 358 U. S. 354 (1959), returns to us after a voyage that has taken it to the Supreme Court and then back to the Southern District. Most of the *dramatis personae* on the defendants' side have disappeared—the steamship owner, Compania Trasatlantica, as a result of the Supreme Court's ruling; International Terminal Operating Co., lessee of the pier and employer of the longshoremen (who boarded the vessel only after the accident), through discontinuance by the plaintiff; and Quin Lumber Co., the marine carpenter contractors, after a settlement for $25,000. Plaintiff went to trial solely against Garcia & Diaz, Inc., hereafter G & D, the husbanding agent for the vessel. Somewhat surprisingly in view of the history of the case, see 142 F. Supp. at 574, and Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. Chi. L. Rev. 1, 3-8 (1959), the trial was without a jury.

After a ten day trial, the District Judge made findings of fact and conclusions of law which were entered as a judgment. He concluded that G & D "had substantial control of the activities and circumstances proximately related to the plaintiff's injuries," and that "The defendant was negligent and its negligence was proximately related to the accident * * *." He awarded plaintiff $4,022.50 for hospital and related expenses and loss of earnings from the date of the accident, May 12, 1954, to May 16, 1955, when the plaintiff again became employed, and $65,000 for mutilation.

humiliation, pain and suffering, from which the $25,000 paid in settlement by Quin was to be deducted. He declined to award damages for loss of earnings after May 16, 1955, on the ground that Romero's present earnings as a power press operator in the United States considerably exceeded what he had earned as a Spanish seaman prior to the accident. Defendant appeals from the entire judgment and plaintiff from the refusal to award damages for loss of earnings after reemployment. We have concluded that the evidence did not warrant a judgment against G & D and accordingly that the judgment must be reversed and the complaint dismissed.

Since none of the three previous opinions recite the circumstances of the accident in any detail and Judge Palmieri's findings and conclusions have not been reported, it becomes necessary to outline the facts.

The S.S. Guadalupe was a combination passenger and cargo vessel of Spanish ownership and registry, owned by Compania Trasatlantica and in service between Spain and ports on the eastern and southern seaboards of the United States, Cuba, and Mexico. G & D served Compania Trasatlantica as agent for the United States and Cuban ports. It had booked a shipment of grain for an eastbound trip; while the Guadalupe was in New York harbor on her westbound voyage to Cuba, Suarez, a responsible employee of G & D, had a representative of the Board of Underwriters come to the ship and discuss the stowage of the grain with the mate, who gave orders as to what shifting boards, feeders, etc., he wished constructed for stowage on the ship's return to New York. G & D arranged for Quin to do this work. Learning that the Guadalupe would arrive early on May 12, 1954, at an International Terminal Co. pier in Hoboken, Suarez instructed Quin to have its carpenters ready that morning and International to have longshoremen avail-

able at 1 P. M., by which time it was thought the carpentry would be completed and the vessel ready to load.[1]

As the Guadalupe sailed up the harbor, the crew removed her booms from their cradles and placed them at a 30 to 35 degree angle from the mast, parallel with the center line of the vessel, and secured by guys. Shortly after 8:30 A. M., a gangplank was put ashore to Pier 1 at Hoboken. Suarez came aboard, along with some 20 Quin carpenters under a foreman. The Court found that, in the course of removing tarpaulins and hatch covers, the carpenters cluttered the deck space in the vicinity of the No. 2 hatch and disarrayed the cables used for raising and lowering the forward starboard boom on that hatch which "had been disposed beside the hatch in an orderly fashion by the crew members who had removed the boom from its cradle earlier that morning." Then Selvaggio, foreman of the Quin carpenters, approached Sampedro, boatswain of the Guadalupe, who was working at the No. 5 hatch, and requested Sampedro to lower the boom at No. 2 hatch so that lumber needed by the carpenters could be lifted from the pier. Campos, the chief mate, and Suarez were standing together on the deck near the No. 5 hatch. Sampedro reported Selvaggio's request to Campos, who authorized him to comply; Suarez was in a position to hear this but denied that he did. Sampedro went off, taking with him the assistant boatswain, the plaintiff and another seaman. Romero's assignment was to handle the topping lift cable which secured the boom as it was being lowered; the cable was being fed around a small drum or "gypsyhead." A marine carpenter voluntarily took a position several feet behind Romero and handed him the

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[1] Defendant claimed the decision not to have the longshoremen report until 1 P. M. was made by the owner and communicated to G & D by a cable. In view of the testimony and of defendant's failure to produce any such cable, the trial judge was justified in finding that the decision not to have the longshoremen available in the morning was made by G & D.

moving cable; a portion of this contained a kink, or "codillo," which Romero testified had been there before the vessel reached New York. Since Romero could not clear the kink in time to save himself from being caught in the revolving drum, he let go of the cable, whereupon a turn or turns slipped off the drum and entangled his legs. The slipping of the cable caused the boom to drop of its own weight. The force of the fall of the boom, with its consequent pull on the cable, resulted in the amputation of Romero's left foot and a severe fracture of his right leg.

The theory of plaintiff's case was that G & D was in control of the loading, either alone or jointly with the owner. Negligence appears to have been predicated on three alternative grounds: *first*, that it was negligent not to have the boom lowered by longshoremen; *second*, that if the boom was not to be lowered by longshoremen, it was negligent not to have it lowered by the carpenters; and, *third*, that, in any event, it was negligent to permit the boom to be lowered as it was in view of the disarray alleged to have been created by the carpenters, their claimed presence on the scene, and the intervention of the volunteer. Recognizing the limitations placed upon the scope of review by F. R. Civ. Proc. 52, we are unable to sustain the trial judge's conclusions as to control and of negligence by G & D.

We are met at the outset by a claim of G & D that the issue of control was settled in its favor by the Supreme Court. The relevant passage is at 358 U. S. 384-385; we quote it in full in the margin.[2] The contention is that since

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[2] "Petitioner made claims based both on the Jones Act and the general maritime law against Garcia & Diaz, Inc. At the pre-trial hearing the District Court concluded that Garcia & Diaz was not Romero's employer and did not operate and control the vessel at the time of the injury. These issues were properly adjudicated, and thus the claims for unseaworthiness and maintenance and cure were properly dismissed. However, the District Court did not consider, and its disposition of the case did not require it to consider,

the only issue remanded was "a claim independent of the employment relationship or operation and control," the District Court was forbidden to find that G & D had any degree of control. This is reading the words out of context. All that the Supreme Court ruled out was a contention that G & D had such an "employment relationship or operation and control" as to give rise to claims for unseaworthiness or maintenance and cure or under the Jones Act, cf. *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783 (1949). On the other hand, since it is essential to a conclusion of liability for negligence that defendant was or ought to have been able to prevent the harm, the Supreme Court, in remanding for trial of "a claim based upon the negligence of Garcia & Diaz," could not have meant to preclude the trial court from finding any facts, established on the trial, that would show such liability.

The relationship between Compania Trasatlantica and G & D was outlined in an agreement made in 1948. This designated G & D as the "consignee" of arriving vessels. G & D was to maintain offices in New York, to obtain passengers and cargo for the vessels, and to enter into all necessary agreements to that end. It was also to collect moneys owing to Compania Trasatlantica, to institute proceedings to recover such moneys, and to expedite the arrival and departure of vessels by carrying out all customs, health, police and other regulations. Further, G & D was to receive cargo for the shipowner's account, to safeguard it, and to deliver it to its consignee. Finally, G & D was "To organize for the account of the Ship-Owner all operation of boarding and landing passengers, loading and discharging of merchandise and baggage and other tasks called for in port

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whether petitioner was asserting a claim based upon the negligence of Garcia & Diaz; a claim independent of the employment relationship or operation and control. Thus it is necessary to remand the case for further proceedings as to this respondent."

to assure regular service on the part of the Ship-Owner's vessels, making available to them for the account of the Ship-Owner, all equipment in personnel and material required for the purpose and governed by the availabilities at each port." For these services G & D was to receive a commission of 5% on originating and 2½% on terminating business, with a minimum of $500 for a freighter and $750 for a passenger vessel. G & D was to bear the cost of the maintenance of its office, including rent and employees' salaries, but not out-of-pocket expenses which it paid simply for the owner's account.

The degree of control exercised by G & D must be determined not simply from the language of the agreement but from operation under it. Much evidence was taken on this. G & D's case was that its function was to serve as a coordinator between ship and shore; it would decide where Compania Trasatlantica vessels would dock and who was to supply longshoremen and then would act as intermediary between the officers of the vessel and the stevedoring company. The usual practice was for Suarez to board Compania Trasatlantica vessels on their arrival, take aboard the mail and booking sheets for cargo, assist debarking passengers requiring hotel accommodations or other special services, talk with the mate, see that loading or unloading operations had gotten started, and then depart. Normally he would spend one or two hours on the vessel in the morning and again in the afternoon, although he might altogether miss days other than those of arrival and departure. When on board, he would frequently act as liaison between the officers and shore personnel, a task for which he was peculiarly fitted by his fluency in Spanish as well as English. This, according to Suarez, was the limit of what he did or was expected to do.

There is much controversy whether or not Suarez bore the title "Pier Superintendent." The evidence was that he

had acquired that title in earlier years when G & D had itself leased piers and, as is not unusual, the title may have stuck after the office ceased. Plainly Suarez did not have powers of superintendence on Pier 1, that function being discharged by Captain Garner, an employee of International Terminal, and the expert testimony as to the responsibilities of a true "pier superintendent" was thus of little relevance. The only evidence that could be seriously urged as contradicting Suarez was certain testimony of Selvaggio, the carpenter foreman; but when this is read as a whole, it also is consistent with the position that Suarez, when on the ship, acted only as intermediary between the carpenters and the officers—Selvaggio admitted he had never had occasion to appeal to Suarez to give orders to the officers. True the judge was not obliged fully to credit Suarez whom he evidently regarded as a not wholly trustworthy witness, as will be seen below; but Suarez' testimony as to the general nature of his responsibilities was supported by that of Martinez, the treasurer of G & D, of the mate and of the boatswain, and accords with normal business practice—an agent like G & D is usually employed to perform functions the ship cannot perform without a shore establishment, not to do things she can do quite as well herself. Clearly G & D was not in control of the vessel during the long periods when Suarez was absent; there would hardly be a shift to joint control whenever he came on board.

Taking the evidence most favorably to the plaintiff, it is apparent that the relation of G & D to the vessel differed *toto coelo* from that of the defendant in *Quinn* v. *Southgate-Nelson Corp.*, 121 F. 2d 190 (2 Cir.), cert. denied 314 U. S. 682 (1941), upon which the Court relied in imposing liability. In that case, the defendant had undertaken to "manage, operate and conduct the business of the line" and "to man,

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[3] Romero's own testimony as to his observations of Suarez added nothing to Selvaggio's.

equip, victual, supply and operate the vessels, subject to such restrictions and in such manner as the owner may prescribe." There the agent was the operator of the vessel, picking the officers and crew subject only to a veto by the Maritime Commission over choice of the former and to other restrictions of a most general sort. Here the officers and crew were selected by the owner, and the ship's officers continued to function while the Guadalupe was in port.

We accept fully that "The liability of an agent for his own negligence has long been embedded in the law," *Brady v. Roosevelt S.S. Co.*, 317 U. S. 575, 580 (1943). But it by no means follows that an agent is liable whenever its principal would be. G & D did not have an affirmative duty to see to it that plaintiff was provided with a safe place and with safe methods to work. Admittedly, Suarez did not himself harm Romero, and no other employee of G & D was about. Under such circumstances an agent is liable in tort only if he "directs or permits conduct of another under such circumstances that he should realize that there is an unreasonable risk of physical harm to others or to their belongings." American Law Institute, Restatement of Agency 2d, §351.

It is thus idle to discuss "control" on an all or nothing basis as the parties have tended to do; what must be determined is whether the judge was warranted in finding that G & D directed or permitted particular conduct entailing an unreasonable risk of harm to Romero. We therefore turn to the various theories of negligence advanced on plaintiff's behalf:

(1) *Failure to have had stevedores aboard to lower the boom.*

Judge Palmieri found, as part of his finding 16:

"Suarez knew that if longshoremen had been aboard on the morning of May 12, 1954, they alone would have

been responsible for lowering and spotting the No. 2 forward starboard boom in order to raise the lumber and load it aboard ship for use by the carpenters. Suarez also knew it was the prevailing custom and practice in New York harbor in 1954 for the lowering or (2126) raising of ships' booms, once they were rigged and out of their cradles, to be done by stevedores; and in exceptional circumstances, by the crew in the absence of stevedores. He also knew or should have known that it was unusual to have marine carpenters on board without stevedores."

Although it is not at all clear that this entered into the judge's conclusion of negligence, the issue is of peculiar importance since, as explained in footnote 1, he would have been warranted in finding that the decision not to have stevedores come aboard until 1 P. M. was made by G & D, although it was doubtless concurred in by the owner. And if the finding here under discussion supported a conclusion of negligence, plaintiff could defend the judgment on that ground even though it was not the one taken by the judge. *Langes* v. *Green*, 282 U. S. 531, 535-39 (1931).

We may assume it to be generally true that, as stated in the first quoted sentence, if longshoremen had been aboard, they would have handled the lowering and spotting of the boom; but this does not make it negligent not to have had them. If the first clause of the second sentence means only that booms of ships in New York harbor were lowered or raised by stevedores more often than by others, it likewise is immaterial; for it includes the typical case where the stevedores have come on to unload or load cargo, as well as the case here presented where construction work must first be done. We do not know whether the judge considered the latter to be examples of the "exceptional circumstances" referred to in the second clause; if

so, the finding would seem to negate rather than support a conclusion of negligence from failure to hire stevedores in such a case. Again the last sentence leaves us in doubt whether "unusual" means numerical in frequency, which would be inconclusive, or bad practice; if the latter, we would be constrained to hold it without adequate evidentiary support.

Turning from the finding to the evidence, we think there was none to prove that safety required the hiring of longshoremen in order to lower a single boom to raise lumber for the carpenters. There was testimony that, in Hoboken and some other parts of the Port of New York, there was a practice of having a gang of seven longshoremen come aboard to lower and spot booms somewhat in advance of arrival of the larger gangs. The inference sought to be drawn is that this would not be done if it were deemed safe for the crew to lower the booms. However, there was no evidence that this practice was pursued, at least on foreign ships, when only a single boom had to be lowered to raise lumber need for the construction of fittings; and there was much to suggest that the practice with respect to American ships rested on union demands for job security rather than on safety considerations. Nothing in the entire record established that it was dangerous for the crew of a vessel, and particularly for the crew of the Guadalupe, to handle their own booms. Indeed, the judge found that this was not hazardous "under normal conditions," as we shall see. The only abnormal condition foreseeable to G & D when it was decided not to have longshoremen come aboard on the Guadalupe's arrival was that carpenters would be on board when a boom would be lowered to raise the lumber. This alone would not create such a hazard as to require longshoremen rather than an adequate complement of the crew.

Romero testified he was familiar with lowering booms and had done it many times; he had said in his deposition that the lowering of booms was a daily maneuver aboard the ship, that "even a cabinboy" knew how to do it, and that he had known how for a long time. True, in direct examination at the trial, he claimed he had never spotted a boom over a dock and had no training in such an operation, and his counsel attempts to distinguish between a mere lowering of the boom and its lateral movement as the boatswain pulled sidewise on the guy to center it over the lumber that was to be brought aboard. This is unpersuasive. Romero had no additional duties to perform by reason of the lateral movement: nor is it even suggested that the boatswain was negligent in his pulling of the guy, or, indeed, that anything that would not have been done if the only movement had been vertical contributed to the accident. Romero was injured because he fed a kinked wire onto the gypsyhead; he would have been equally injured if the only task were the lowering of the boom, a task which he admitted he was quite capable of doing and had often done.

(2) *Failure to have the boom lowered by the carpenters in the absence of longshoremen.*

The judge made no finding that, in the absence of longshoremen, it was negligent not to have the boom lowered by the carpenters rather than the crew; indeed, his finding seems to have been to the contrary, as we shall see. Nevertheless plaintiff is entitled to seek to defend the judgment on that ground if the record supports it, *Langnes* v. *Green*, *supra*, although in this respect without benefit from the "unless clearly erroneous" rule. The record does not do so, quite apart from the fact, developed in (3) below, that, in contrast to the decision not to summon longshoremen,

there was no sufficient evidence that G & D was responsible for the decision to have the crew rather than the carpenters do this work.

Testimony that the practice was to have such work done by the carpenters was given by two of plaintiff's experts, Ash and Orlando; however, Ash's evidence was that this practice was designed primarily for the safety of the carpenters and Orlando's seems to relate to the situation where the carpenters were already working in the hatch rather than, as here, where they were still on the deck, and thus also is oriented to the safety of the carpenters rather than of the crew. As against this the boatswain and the mate testified they had never seen this work done by carpenters rather than the crew; and four other witnesses —the foreman of a large marine carpentry firm, the pier manager for International Terminal, an experienced steamship captain, and a witness who combined experience as a master with that as a stevedoring superintendent— agreed that, under the circumstances here, the practice in the Port of New York was to have the boom lowered by the crew rather than by the carpenters. Moreover, Selvaggio, the Quin foreman, and Amodio, his assistant, stated their practice was to do precisely what was done here, namely, to "get the mate or the boatswain and tell him if he could do it for us." In the light of all this, as well as the discussion as to the capability of the crew under point (1), a finding of negligence on anyone's part in having the boom spotted and lowered by the crew rather than the carpenters would have been clearly erroneous.

(3) *Other acts of negligence.*

In addition to the extract from finding 16 quoted in (1) above, the judge's basic findings of negligence were contained in his finding 21; this we quote in full:

"21. Under normal conditions, the boatswain Sampedro, the plaintiff, and the two other seamen who were engaged in the work task of spotting the boom, would have been sufficient in number and skill to have accomplished the assignment without reasonably foreseeable risk of injury. The conditions at the time and place of the accident were not normal, however, and (2130) were, in fact, unusual and hazardous in the following respects:

(a) The presence and participation of the unskilled marine carpenter, as aforesaid;

(b) The cluttered condition of the deck and the disarray and resulting kinked condition of the cable which was passed into the plaintiff Romero's hands shortly before the accident;

(c) The presence of several marine carpenters in and about the area of the accident;

(d) The inadequacy of the work crew engaged in the said task because of these unusual conditions."

Defendant attacks all four subsidiary findings either as unsupported by the evidence, or as relating to matters having no causal relation to the accident, or as both. Although it may not be strictly necessary to rule on all these objections since, for the reason hereafter discussed, the judgment could not stand even if all ~~of them~~ the findings* were warranted, it will add to clarity if we do this; we find merit in some of defendant's criticisms but not in all.

Taking the subsidiary findings in reverse order, we think there was no substantial evidence that a crew of four men was inadequate, save as the particular condition of the cable may have required more. The judge himself found that, "under normal conditions," four "would have been suffi-

* Changed by letter advices from Office of Clerk, Court of Appeals for the Second Circuit, February 1, 1961.

cient in number and skill to have accomplished the assignment without reasonably foreseeable risk of injury. * * * "; we accept that finding. If the boatswain, his assistant and two seamen would have sufficed "under normal conditions," we see no basis for concluding that "The presence of several marine carpenters in and about the area of the accident," assuming in plaintiff's favor that the judge was justified in finding this to be the fact, added such an element of danger as to have made the operation hazardous to the crew or even to have required a larger complement if such hazard was to be avoided. Almost all the testimony that it was bad practice for the crew to lower a boom while shore personnel were standing by seems to have been concerned with danger to the latter, who might be hurt by the boom or other gear, rather than with added hazard to the crew, whose maneuvers would be the same regardless of the bystanders. The cluttered condition of the deck, if such there was, does not appear to have had any causal relation to the accident. On the other hand, the disarray of the cable by the carpenters, a fact which we assume in plaintiff's favor although seriously disputed, might have caused Romero to have had less notice of the approach of the "codillo" than if the cable had been stretched, and hence may have made it desirable to supplement the normal complement with a seaman experienced in the work and capable of warning Romero in Spanish,—and this even though Romero admitted that the "codillo" that caused the accident did not result from the disarray of the cable and could not have been removed. Indeed, the badly kinked condition of the cable might have made this advisable, quite apart from the alleged disarray. Also, although there is no evidence that "the unskilled marine carpenter" affirmatively contributed to the accident, a fellow crewman experienced in handling the cable might have warned Romero and slowed the feeding of the cable to the gypsyhead.

The difficulty which plaintiff cannot surmount is that while the evidence would thus suffice to establish negligence, as well as unseaworthiness, if the action were against an owner, it does not cast G & D as liable without further proof. The additional proof needed was that G & D, knowing or having a duty to know of the dangerous condition created by the carpenters' disarray of a cable with kinks or by the kinks themselves, directed or permitted the lowering of the boom by an inadequate complement of crew. The evidence established none of this. There was no evidence that Suarez knew of the kinking in the cable or the disarray alleged to have been created by the carpenters at No. 2 hatch. Neither was there any basis for charging G & D with such knowledge; as husbanding agent; G & D had no responsibility for the ship's gear and its duty was to arrange for the presence of the carpenters, not to supervise what they did. Whether the judge was justified in finding that Suarez heard the boatswain report the carpenter foreman's request to the mate is disputed; we shall assume in plaintiff's favor that he was, since Suarez was in a position to hear the report and the judge was not bound to credit his denial even in the absence of contradiction. However, this is not enough. Even if the conversation apprised Suarez that the boom was to be lowered by the crew, it was not negligent for Suarez to permit this, and nothing gave him any indication that a larger than normal gang might be required or that the boatswain would not provide one if it were. Determination of all this was the responsibility of the representatives of the crew's employer, namely, the ship's officers, not of Suarez; there was no reason for him to assume the boatswain would not recruit a complement "sufficient in number and skill" under whatever conditions the boatswain found to prevail when he arrived at No. 2 hatch. We need not speculate whether

the mate would have honored a suggestion on Suarez' part; it was not Suarez' duty to make one.

Many decisions in this Circuit, some in civil actions and others in admiralty, have held that a judge's determination of negligence, as distinguished from the evidentiary facts leading to it, is a conclusion of law freely reviewable on appeal and not a finding of fact entitled to the benefit of the "unless clearly erroneous" rule. *Sidney Blumenthal & Co.* v. *Atlantic Coast Line R. Co.*, 139 F. 2d 288, 290 (1943), cert. denied 321 U. S. 795 (1944); *Barbarino* v. *Stanhope S.S. Co.*, 151 F. 2d 553, 555 (1945); *Kreste* v. *United States*, 158 F. 2d 575, 577 (1946); *Great Atlantic & Pacific Tea Co.* v. *Lloyd Brasileiro*, 159 F. 2d 661, 665, cert. denied 331 U. S. 836 (1947); *Guerrini* v. *United States*, 167 F. 2d 352, 356, cert. denied 335 U. S. 843 (1948); *Johnson* v. *United States*, 168 F. 2d 886, 887 (1948); *Lynch* v. *Aguilines*, 184 F. 2d 826, 828 (1950). Despite possible negative inferences that might have been drawn from *McAllister* v. *United States*, 348 U. S. 19 (1954), we have continued to apply this rule both in civil actions, *Dale* v. *Rosenfield*, 229 F. 2d 855, 858 (1956), and in admiralty, *New York, New Haven & Hartford R. Co.* v. *Gray*, 240 F. 2d 460, 465, cert. denied 353 U. S. 966 (1957); *Verbeeck* v. *Black Diamond S.S. Corp.*, 269 F. 2d 68, 70 (1959). The basis of these decisions is that determination of negligence involves first the formulation and then the application of a standard of conduct to evidentiary facts found to be established. When all this has been done by a judge, a reviewing court has no means of knowing whether he formulated the standard correctly, since he does not charge himself. Thus there must be free review of his ultimate determination of negligence although not of the facts on which it was based

The rule of free review applied in these cases would plainly require reversal here. However, even if we are no

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longer permitted to adhere to what we regard as the sound view taken in his long line of decisions, as our colleagues in the Ninth and Sixth Circuits tell us, *Pacific Tow Boat Company* v. *States Marine Corp.*, 276 F. 2d 745, 752 (1960); *Imperial Oil, Ltd.* v. *Drlik*, 234 F. 2d 4, 10 (1956), cert. denied 352 U. S. 941 (1956), an issue which we may leave for another day, we are constrained to reverse here on the basis, stated in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948), that "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The judgment is reversed and the complaint dismissed.

FERNANDO CAMPOS, *Chief Mate*

Cross Examination:

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The Court: When the boatswain spoke to you about the request that had been made of him by Mr. Selvaggio, did you then know whether the carpenters were aboard the vessel?

The Witness: I didn't know that there were any carpenters on board.

Q. And at the time that the boatswain did speak to you, Mr. Suarez was right next to you, isn't that true? A. Yes, we were talking to each other.

Q. Now, Mr. Campos, if you knew that there were carpenters working at the No. 2 hatch, and around the No. 2

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hatch, and the No. 3 hatch, would you then have consented to the boatswain's request that crew members operate the boom?

Mr. Quinlan: Lower the boom.

A. Yes, I would have still told him to go ahead and lower the boom, because it is a known fact to all the crew members, and especially to the boatswain, that no shore worker, be he a carpenter, an electrician or painter, is to have anything to do and touch the boom or the winch, that he has nothing to do with it, and they are prohibited from touching the boom and winch.

Q. Who prohibits and what rules have ever been promulgated that you know of for the carpenters, when stevedores are not aboard, not to handle the booms and winches?

Mr. Klonsky: Your Honor, I respectfully submit he is not waiting for the question to be fully propounded in Spanish.

The Court: Please, Mr. Campos, wait until the interpreter has completely finished his question, and answer the question only after you are certain that the interpreter has finished interpreting.

A. It would be the crew members, the members of the crew

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who are working the cargo and who are around the hatch at the time. They would be the ones to prohibit anyone from touching the equipment.

Q. Do you know of any rules that are written by the company, or any orders that you or any officer gave to the shore workers to stay away from handling the booms and winches unless they were stevedores? A. How can I give orders to the painters, for example, if I don't see the painters around.

Q. I said carpenters. A. If I would see any carpenter around the boom or winch, touching it, I would say "Get away." It would be in the same manner as if a sign were put on the door, "No one permitted to go inside except for authorized personnel." If someone went in who was not authorized, he would be thrown out. But if his Honor, the Judge, would tell me, "Well, come in through this door," and he is the authorized person to allow me to come, and

he orders me to come in, then I would be allowed to come in. And if someone would come over to me and say, "Why are you here?" I would tell him that the judge instructed me to come here, and if I didn't tell him that, he would just throw me out.

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The Court: Mr. Campos, you have answered the question. Wait for a fresh question now.

By Mr. Klonsky:

Q. Will you please listen to the question and answer just what I ask you, Mr. Campos. A. To answer you directly I have to answer in this fashion so that you understand what I am saying.

Q. Well, I will break down that question into several parts.

First, were there any written rules that you know of by Compania Transatlantica stating that carpenters should not work booms and winches? A. No, there is no rules like that.

Q. Second, did you at any time, from the very beginning of the voyages of the Guadalupe to New York ports, from the very beginning when the carpenters first came aboard, tell the carpenters, "You are not to operate the winches and the booms"? A. I didn't tell them that.

Q. And when you were talking to Mr. Suarez at the gangplank, at the time the boatswain requested or spoke to you about the boom, did Mr. Suarez tell you that there were carpenters aboard the ship? A. No, it was at a time that

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the boatswain told me that he was going to prepare the boom when he mentioned the carpenter and pointed him out to me, and at that time I saw the carpenter.

Q. Well, you saw Mr. Selvaggio, isn't that right? A. Yes, when the boatswain pointed him out to me; not before.